Supreme Court, U. S.
FILED
FEB 14 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1978

No. 78-789

JIMMY LEE CLARK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

JOHN E. SHOOP
Prosecuting Attorney for the State of Ohio
Lake County Court House
47 North Park Place
Painesville, Ohio 44077
(216) 352-6281 Ext. 281
Attorney for Respondent

ALBERT L. PUROLA
JOHN WINTHROP OURS
38052 Euclid Avenue
Willoughby, Ohio 44094
(216) 942-6262
Attorneys for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

OPINION BELOW 1
JURISDICTIONAL STATEMENT 1
QUESTION PRESENTED 1
ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
ARGUMENT 4
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

In re Winship, 397 U.S. 358 (1970) 5
Leland v. Oregon, 343 U.S. 790 (1952) 4
Lockett v. Ohio, ... U.S. ....., 57 L. Ed. 2d 973 (1978) 8
Mullaney v. Wilbur, 421 U.S. 684 (1975) 4, 5, 6
Patterson v. New York, 432 U.S. 197 (1977) 4, 5, 6
Snyder v. Massachusetts, 291 U.S. 97 (1934) 4
Speiser v. Randall, 357 U.S. 513 (1958) 4
State v. Seliskar, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973) 6

Statutes

Section 2901.05(A), Ohio Revised Code 6
Section 2901.22(A), Ohio Revised Code 2, 9, 10
Section 2903.01(B), Ohio Revised Code 7, 8
Section 2903.04(A), Ohio Revised Code 8
Section 2923.03, Ohio Revised Code 2, 8

Supreme Court of the United States

October Term, 1978

No. 78-789

JIMMY LEE CLARK,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

OPINION BELOW

Omitted pursuant to Rule 40(c)

JURISDICTIONAL STATEMENT

Omitted pursuant to Rule 40(c)

QUESTION PRESENTED

Does a state criminal statute which defines "purpose" alternatively as (1) "a specific intention to cause a certain result" or (2) "where the gist of the offense is a prohibition of conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature," thus allowing proof of the element of purpose by the *conduct* of the defendant, violate the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2901.22(A), Ohio Revised Code:

"A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

Section 2923.03(A), Ohio Revised Code:

"No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:

* * * * *

(2) Aid or abet another in committing the offense;

* * * * *

(F) Whoever violates this section is guilty of complicity in the commission of the offense and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense."

STATEMENT OF THE CASE

On December 12, 1975, Jimmy Lee Clark and "Slick Willie" Jones marched into a freeway-interchange gas station in Willoughby, Ohio, robbed attendant Joseph Bradshaw, Jr. of all the money he had, and then shot him dead.

Both were charged with aggravated murder with one specification of aggravated robbery, which under the Ohio

statutory scheme at the time, required imposition of the death penalty upon conviction.

Clark told police, and said at his trial, that after the robbery was concluded, Brawshaw was marched into the back room, and forced to lie, spread-eagle, on the floor. Clark then turned and started to walk out of the room. As he left, he heard two shots.

Jones quickly joined Clark in the getaway car, where Clark noted that instead of shooting his victims, his preferred procedure was to simply tie them up. Jones uttered a profanity, and the two drove away.

Police later found Joseph Bradshaw's body where he had been executed, with bullet wounds in the back of his head and neck.

On March 22, 1976, Jimmy Lee Clark was found guilty as charged of aggravated murder with a specification of robbery. The trial judge found a mitigating circumstance in Clark's mental deficiency, and he was spared electrocution. Clark is now serving a life sentence for his crimes.

Petitioner herein has unsuccessfully urged the question presented in his petition at the trial level, in his appeal as of right, and in the discretionary appeal granted him by the Ohio Supreme Court.

At all levels, petitioner has alleged the absolute failure of the State of Ohio to prove he specifically intended to cause the death of Joseph Bradshaw, and that therefore the State of Ohio cannot convict him of murder.

Petitioner correctly notes, at Petition at 3, that the trial judge instructed the jury that the state bore the burden of showing he had a purposeful intent to cause the death of Joseph Bradshaw.

But what petitioner fails to note for this court are the instructions given to the jury regarding the crime of Complicity (at R. 391), and the statutory definition of the degree of purpose which must be shown to support a conviction (at R. 392).

Because both instructions accurately reflected the statutory definitions noted in the Additional Constitutional and Statutory Provisions Involved, *supra*, and discussed extensively herein, they will not be repeated here.

ARGUMENT

Petitioner's reliance on *Mullaney v. Wilbur*[1] and *Patterson v. New York*[2] is misplaced, as in neither case did this court reach a holding which requires setting aside Ohio's statutory scheme for defining crimes involving those who conspire to rob and kill.

Petitioner further ignores the well-established principle that this court will not regulate a state's criminal procedure on Fourteenth Amendment Due Process grounds unless such procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[3]

Any faint resemblance petitioner's argument has to a significant constitutional question evaporates upon analysis, and for three reasons.

---

1. 421 U.S. 684 (1975).

2. 432 U.S. 197 (1977).

3. *Speiser v. Randall*, 357 U.S. 513 (1958); *Leland v. Oregon*, 343 U.S. 790 (1952); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

First, the facts in *Mullaney* and *Patterson*, upon which petitioner relies so heavily, are at significant variance with those herein.

Second, even if the holding in *Mullaney* went to the lengths petitioner desires, this court made it clear in *Patterson* that *Mullaney* cannot be construed as petitioner wishes.

And third, an examination of the Ohio statutory definition of crimes involving robbery-murder will show that petitioner has not been denied due process.

I

Petitioner suggests that *Mullaney* and *Patterson* prohibit the state from proving an element of a crime by means of a presumption based on proof of other elements of the crime, and that therefore his conviction for aggravated murder should be set aside because his accomplice's intent to kill their common victim was imputed to him by means of a statutory presumption.

Leaving until later a full discussion of why neither statutory presumptions nor imputations of intent are involved herein, it should be noted that *Mullaney* and *Patterson* do not hold what petitioner wishes they held.

Mullaney and *Patterson* deal, simply, with the extent to which a state may require a criminal defendant to prove affirmative defenses or mitigating factors to the crime charged. In both, the statutory scheme shifted an allegedly improper burden of proof to the defendant.

But petitioner herein was required to prove nothing as to his guilt or innocence at trial. All burden of proof as to that issue rested, as required by *In re Winship*[4] and

---

4. 397 U.S. 358, 364 (1970).

applicable state law,[5] on the prosecution. No burden of proof of anything regarding guilt or innocence was ever shifted to petitioner during trial.

Such *was* the case in *Mullaney*, where Maine's statute required a defendant in a homicide case to prove the mitigating elements of manslaughter, a requirement rejected by this court as an impermissible shift of the burden of proof.

Such was also the case in *Patterson*, where this court specifically limited the scope of *Mullaney*, holding that New York's statutory scheme requiring the defendant to bear the burden of proof of affirmative defenses did not violate the Due Process Clause of the Fourteenth Amendment.

This case does not involve mitigating elements to murder. It does not involve affirmative defenses. It does not involve shifting of any burden of proof to petitioner. It therefore does not involve a denial of constitutional rights as discussed in *Mullaney* and *Patterson*, and it thus cannot be said that the Ohio Supreme Court decided a substantial constitutional question in a manner probably not in accordance with the applicable decisions of this court.

II

The question raised herein by petitioner has already been asked and answered in *Patterson*, at 432 U.S. 214, at note 15:

> There is some language in Mullaney that has been understood as perhaps construing the Due Process Clause to require the prosecution to prove beyond a reasonable doubt any fact affecting "the degree of criminal culpability." (Citations omitted.) It is said that such a rule would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine the legislative reform of our criminal justice system. (Citations omitted.) *This Court did not intend Mullaney to have such far-reaching effect.* (Emphasis added.)

5. Section 2901.05(A), Ohio Revised Code; *State v. Seliskar*, 35 Ohio St. 2d 95, 298 N.E.2d 582 (1973).

Petitioner's plea for a writ should therefore be dismissed as improvident.

III

It is urged by petitioner that the State of Ohio was able to prove he intended that Joseph Bradshaw be killed only by proving that accomplice "Slick Willie" Jones had such intent, and by imputing Jones' intent to him. Such was not the case.

In support of his assertion of imputation of intent, petitioner provides this court with an incomplete and therefore misleading review of the statutory definitions related to the crime of aggravated murder.

He correctly quotes Ohio Revised Code Section 2903.01 (B) as reading:

> No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit . . . aggravated robbery or robbery . . . .

This is the classic felony murder rule, modified to limit the felonies which will constitute the aggravating

factor and requiring the state to prove a purposeful intent to kill.[6]

Petitioner ignores, however, two other sections of the Ohio Revised Code which form the basis for his conviction. An examination of those provisions will betray the weakness of petitioner's argument.

Section 2923.03 provides, in part:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> * * * * *
>
> (2) Aid or abet another in committing the offense;
>
> * * * * *
>
> (F) Whoever violates this section is guilty of complicity in the commission of the offense and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

When considered *in pari materia* with Section 2903.01 (B), the result is obvious: Whoever aids or abets another who causes death while attempting, committing, or fleeing from a robbery or aggravated robbery, shall be prosecuted and punished in the same manner as the principal offender.

---

6. The classic felony murder rule is contained in Ohio Revised Code Section 2903.04(A), Involuntary Manslaughter, which reads "No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony."

Conviction of the crime of aggravated murder, or "purposeful felony murder" results in a penalty of life in prison. See *Lockett v. Ohio*, ... U.S. ....., 57 L. Ed. 2d 973 (1978). Involuntary Manslaughter is punishable by a term of 4-25 years in prison.

Petitioner was convicted of committing aggravated (armed) robbery and aiding or abetting a co-defendant who committed murder in the course of aggravated robbery. He points out that the element of "acting with the kind of culpability required to commit an offense" is not proven beyond a reasonable doubt when he is charged and prosecuted simply as one who aids or abets.

The operation of a final section of the Ohio Revised Code completes the statutory scheme in such an event. The kind of culpability required to be demonstrated in order to prove the crime of aggravated murder in Ohio is "purposely". And the Code defines "purposely" at Section 2901.22(A) as follows:

> "A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of this nature."

There is no question that petitioner did not specifically intend that Joseph Bradshaw die. He preferred to tie his victims up. Yet, in light of the terms of Section 2901.22 (A), we cannot, as petitioner has done, stop our analysis here.

The gist of the prohibition against aiding and abetting another to commit aggravated murder in a robbery setting is a prohibition against engaging in a robbery in such a manner that a death will be caused during or after such robbery. If one specifically intends to engage in such a robbery, he specifically intends to engage in conduct prohibited by the gist of the applicable statutes.

Petitioner does not contend that he had no specific intent to engage in the aggravated robbery. He only

contends that such specific intent cannot, even via the "gist of the offense" clause of Section 2901.22(A), support a finding of specific intent to murder.

Assuming, *arguendo*, the truth of petitioner's contention, it becomes obvious that the specific intent required can be found by the making of a simple presumption, well founded in both common sense and authority so basic that it need not be cited here.

That presumption is simply that *one is presumed to intend the natural and probable consequences of his voluntary acts.*

Petitioner does not deny that he intended to rob Joseph Bradshaw. He does not deny that he intended to have a handgun be used as a means of coercion in that robbery.

As the trial judge stated in denying the motion for acquittal:[7]

> This defendant deliberately engaged in a robbery knowing that his cohort was armed with a gun to be used in perpetrating the robbery. It takes no great intelligence nor research to conclude that a handgun will cause death. It has few other uses. When used forcefully, in a robbery, without a doubt, the very purpose and consequence of its use, is death. It is very useful in the disposal of victims and witnesses. The defendant knew this. He expressed that his preferred method was to tie his victims up. The law, in a case such as this, imputes purpose to the defendant because of his knowledgeable and aware participation.

Thus, to find the defendant guilty of murder, the jury must have found that one natural and probable consequence of the use of a handgun in a robbery is the death of the victim; that the state proved beyond a reasonable doubt that the defendant specifically intended that a gun be used in the robbery and that he thereby intended the natural and probable consequences of that use; that the state proved beyond a reasonable doubt he specifically intended to engage in an offense the gist of which was prohibited by statute, and that he therefore had a specific intent to cause Joseph Bradshaw to die.

7. See Petition, at A19.

Such a course of logic is not prohibited by the Constitution. To hold that it would be prohibited would be to hold that a presumption basic to our criminal justice system is invalid; that further the felony murder rule denies due process, and that one may participate in the most heinous of crimes without liability as long as one does not actually pull the trigger.

The statutory scheme Ohio has adopted for defining crimes involving conspiracies to rob and kill therefore does not "offend some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[8] Ohio's scheme is *based* upon such traditional and fundamental principles of justice.

Petitioner has therefore failed to provide any basis for this court to grant certiorari.

CONCLUSION

The State of Ohio submits that petitioner has failed to sustain his burden of establishing special and important reasons for granting the writ as required by Rule 19.

The question presented by petitioner, viewed in light of the true facts and law, does not involve a significant

8. See note 3, *supra*.

question of federal law which has not been, but should be, settled by this Court; nor has the Ohio Supreme Court in this instance decided a substantial federal question in a manner which probably conflicts with the applicable decisions of this court.

For all of the above reasons, this court should exercise sound discretion and deny certiorari herein.

Respectfully submitted,

JOHN E. SHOOP
Prosecuting Attorney for the State of Ohio
Lake County Court House
47 North Park Place
Painesville, Ohio 44077
(216) 352-6281 Ext. 281
Attorney for Respondent